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ROYAL COMMISSION ON MATTERS OF HEALTH AND SAFETY
ARISING FROM THE USE OF ASBESTOS IN ONTARIO

CHAIRMAN: J. STEFAN DUPRE, Ph.D.

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ROBERT UFFEN, Ph.D., P.Eng., F.R.S.C.

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APPEARANCES:


Mr. N. McCombie

Miss L. Jolley

Mr. T. Lederer

Injured Workers Consultants
Ontario Federation of Labour
Government of Ontario

180 Dundas Street
Toronto, Ontario
Tuesday,
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9:00 a.m. Session
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THE FURTHER PROCEEDINGS IN THIS INQUIRY
RESUMED PURSUANT TO ADJOURNMENT

APPEARANCES AS HERETOFORE NOTED

DR. DUPRE: Ready, counsel?

MR. LASKIN: I am ready, Mr. Chairman.

DR. DUPRE: May we come to order, please?

This morning the Commission welcomes Mr. Walter Melinyshyn, acting director of the industrial health and safety branch in the Ministry of Labour.

Mr. Melinyshyn, would you come forward and be sworn, please?

WALTER MELINYSHYN, SWORN

EXAMINATION-IN-CHIEF BY MR. LASKIN

Q. Now, Mr. Melinyshyn, as I understand it you are an engineer by profession, having graduated from the University of Toronto in 1958?

A. That's correct.

Q. And upon graduation you joined the Ontario

Q. (cont'd.) government with the Ministry of Transportation and Communication?

A. That's correct.

Q. How long did you remain with that ministry?

A. For the period of 1958 until June of 1981.

Q. What responsibilities, generally, did you have within that ministry over the period of time?

A. Initially it was in the engineering field, with bridge design, highway design and gradually in time I became involved with the capital highway program that essentially was improvements to the highway system all over the province of Ontario.

Following that I was involved with introducing transit in the province of Ontario, and the subsidy structure that we now see reflected through a lot of municipalities.

I was then involved with the strategic planning secretariat, which...or whose mandate at that time was to develop planning and corporate policy processes for the ministry, and finally was involved with the management improvement branch, as director, before I came with the Ministry of Labour.

Q. What responsibilities have you had with the Ministry of Labour since you first came to that ministry?

A. Just two, primarily. Initially it was a secondment as acting director of the construction health and safety branch. That was from the period of June, 1981, until April, 1982, and for the past ten weeks as director of the industrial health and safety branch.

Q. Whom did you replace at the construction health and safety branch?

A. Initially there was a director whose name was Keith Cleverdon, but there was an acting period taken by Mr. M. Pizak. I actually replaced him when I came on board.

Q. And who replaced you when you moved to industrial health and safety?

A. Mr. Pizak was back in as acting director.

Q. As acting director.

A. Of health and safety.

Q. Are you director or acting director of the industrial health and safety branch?

A. In all fairness, I would say I'm acting.

Q. Whom did you replace?

A. Jim McNair, the previous permanent director of the branch.

Q. What's the difference between an acting director and a director?

A. I think it's an administrative approach to avoiding several things initially, like competition and such, and it gives a trial period to see if people are happy with performance with this. It's an approach used in government.

Q. All right.

I understand that you have some opening remarks that you wish to make to this Commission?

A. If I may.

Q. Sure.

A. Mr. Chairman, perhaps my appearance today may not be as fruitful as you had hoped, because of my very short tenure in the position, of ten weeks. But I would like to bring out some introductory material which I think is relevant and I would like to put it out front and possibly out of the way, or perhaps it may generate some discussion.

So I am very pleased, then, to give a brief description of the industrial health and safety branch, it's present role in the implementation and enforcement of health and safety legislation.

5 THE WITNESS: (cont'd.) The branch's mandate is to ensure implementation of an effective occupational health and safety program to reduce or eliminate accidents, fatalities and occupational diseases in the industrial and institutional establishments in the province.

10 The industrial health and safety branch currently has a complement of one hundred and eighty-seven. It's decentralized into five administrative areas, with twenty regions, and has a hundred and twenty-six front line health and safety inspectors assigned in districts throughout the province.

15 The inspectors are advised and assisted by regional managers, and by staff regional engineers and senior consulting engineers, who also handle the review of plans for new factories, and look at changes in processes involving toxic substances.

20 To convey an appreciation of the scope of activities undertaken in approximately one hundred thousand workplaces involving a work force of approximately three and a quarter million workers, it should be noted that for the fiscal year April, 1981, to March, 1982, the branch made forty-eight thousand, eight hundred and fifty-nine inspections, issued seventy-one thousand, two hundred and eighty-five orders, reviewed three thousand, one hundred and thirty-one plant submissions, investigated a hundred and fifty-three refusals to work, and initiated the laying of four hundred and seventy-five charges.

25 I should explain here that we now have a term called extended coverage, where these activities take us into hospitals, universities, nursing homes, etc., and these contributed to twenty-eight percent of the inspections and fifty-two percent of the orders.

30 I have a copy here. Would it be convenient...it just occurred to me.

MR. LASKIN: Thank you.

5 THE WITNESS: The branch staff also conducted three hundred and forty-eight consultation meetings with management, and one hundred and seventy-two with trade unions.

Now, the administration of legislation, the regulations or guidelines, as is the case for asbestos, or for very specific regulations such as those that we have now in place for lead and mercury, is carried out under several branch subprograms-specifically these are inspection, investigation, 10 consultation and predevelopment review.

I'll just touch upon them briefly later.

Our branch relies very heavily on the occupational health branch, which provides advice and technical assistance to our inspectors on workers' exposures to toxic substances or 15 agents in the workplace.

The ministry has chosen to rely on a specialist - such as the physicians, hygienists, the engineers, all of whom are decentralized and again have offices throughout the province, and they provide the specialized technical support to our 20 inspectors.

→ The inspector's responsibility, then, is to know and administer the legislation, to be able to identify the potential hazards and involve the specialists when they are required.

25 Under the legislative framework of the occupational health and safety, responsibility of assuring safe and healthy conditions at a workplace rests with the owner, the employer, the supervisor and the worker. The Act requires that labour and management representatives form a joint health and safety committee which provides a structure necessary for self-compliance.

30 The committee is a forum where workers can participate. It has power to obtain information regarding health and safety matters, identify situations which may be a source of

THE WITNESS: (cont'd.) hazard to the workers, and ultimately to make recommendations.

5 What I just described, I guess, and I won't dwell on it any further, is the internal responsibility system, and now the Ministry of Labour's role, through a strong and effective inspectorate, is to facilitate compliance with the Act and Regulations by promoting the functioning and development of the internal responsibility system in the four subprogram areas I
10 mentioned earlier.

 The first one is the cyclical inspection of the workplace, with labour and management, to monitor for compliance and promote the so-called internal responsibility system.

15 Number two, the investigation of fatalities, serious accidents, hazards, complaints and work refusal, again involving labour and management, to assess cause, compliance and future control measures.

20 Three, consultation...consultation with specific employers and unions whose records indicate potential for improvement. This includes those experiencing major occupational health and safety problems.

 Four, predevelopment review of buildings and alterations, additions and changes in process, to check for compliance with the provision of the Act and Regulations, and encourage installation of engineering control measures.

25 If I just may very briefly deal with each one of these:

 Inspection - Inspection schedules, other than special visits, are set up by the inspector, using as criteria data on jobs hazards, company history of compliance, and injury statistics. Visits to workplaces are made without prior notice.

30 The employer and worker representatives are contacted and interviewed to determine if there were any

THE WITNESS: (cont'd.) outstanding unresolved health and safety concerns. The inspector then guides a discussion between the two parties, and attempts to resolve the concerns in a satisfactory manner.

The inspector checks the plant in the areas with outstanding unresolved concerns, for compliance with regulations, during a tour of the plant in the company of management and worker representatives. When the inspector identifies a hazard - for example, possible worker exposure to asbestos - the inspector may take samples for analysis of asbestos content and request assistance from the OHB to evaluate the extent of exposure.

Where necessary, orders are issued by the industrial health and safety branch inspectors, and in matters relating to occupational health it is again, I stress, the policy of this branch to rely very heavily on the recommendations in the occupational health branch report.

The final part of an inspection consists of a discussion of the concerns, suggestions, and orders issued, with worker and employer representatives, and a review of the existence and functioning of a joint health and safety committee.

Confirmation is obtained on the report from management/labour that all areas have been covered.

Followup procedures also involve inspections, and these are part of the whole inspection cycle.

The second one was investigations.

Investigations essentially involve a workplace visit by an inspector, regardless of the regular inspection cycle. When an employer gives notification under Section 26 of the Act, of a serious accident or occupational illness, a special visit will be made and an investigation undertaken to ascertain the potential cause of the accident or illness. Special visits are made to ascertain if orders to discontinue use of specific

5 THE WITNESS: (cont'd.) equipment or material have been followed, or that counter measures have been taken to control the risk of reoccurrence of an accident or occupational illness.

10 In workplaces where the internal responsibility system has broken down and advice or recommendations made by the joint health and safety committee have not been acted upon, a worker or a union could also seek action to correct unhealthy or unsafe work conditions by forwarding a complaint to the branch, and an officer will go out into the field and undertake an investigation in the workplace.

15 If a situation is serious, workers may exercise their right to refuse to do unsafe work. These work refusals are investigated by an inspector in the presence of the worker, the employer representative and where applicable, a worker representative from the health and safety committee.

20 The worker is protected from reprisal by the employer if he follows the proper procedures as laid out in the Act.

25 If matters involving hazardous substances are encountered, again, I stress, the inspector has the option and may request the assistance of the occupational health and safety branch.

30 In consultations, the industrial health and safety branch regional managers and inspectors select employers and unions for whom special consultation would be beneficial, and make arrangements to discuss the Occupational Health and Safety Act with them.

Participation in this activity by a union or an employer is voluntary, but when requested by ministry inspectors it is seldom refused.

An inspector uses the following criteria in

THE WITNESS: (cont'd.) initiating a consultation:

5 A review of the company's accident record, attitudes towards occupational health and safety, the company's record of compliance with orders, etc.

Occupational health hazards specific to a company's operations may also be discussed at these meetings. After a session, participants are left, in most cases, with a better understanding of their responsibility, the procedures and provisions of the Act.

10 Finally, predevelopment review: New buildings and process changes involving toxic materials are required by regulation to undergo a plan review by an engineer of the Ministry of Labour.

15 When reviewing drawing submissions for compliance with the Regulations under the Occupational Health and Safety Act, a regional engineer examines the building and the process equipment to check if the proper provisions to control toxic materials have been provided.

20 In a process which may involve exposure of workers to asbestos, items such as ventilation systems, locker facilities, location of drinking fountains, lunchroom and shower rooms are all checked.

25 When necessary, the occupational health branch again provides technical assistance to the regional engineer during plan review. Records of the review, submission and comments are combined with the inspection file and thus remain available for the officers or inspectors on their future inspections.

30 Training: Inspectors and engineers are given a basic training in the recognition, evaluation and control of occupational health hazards. All new inspectors undergo a twelve-week training course on the requirements of the Act,

5 THE WITNESS: (cont'd.) the Regulations and Procedures outlined in the branch operations manual. Engineers attend an industrial ventilation seminar given by the American Conference of Governmental Industrial Hygienists, to receive training in evaluating design and operation of ventilation systems.

10 Over the past five years, ninety-four of our inspection staff have attended occupational health courses held by the occupational health branch, or those offered by Humber College.

The hazards of specific substances such as asbestos, their identification, evaluation and control methods, were also reviewed during periodic group meetings with a specialist from the occupational health branch.

15 Additionally, our inspectors and engineers receive the training by experience gained in the performance of their job duties in the workplace.

20 Inspectors are provided with some rather simple and basic equipment such as the colormetric air sampling cubes to measure concentrations of gasses and fumes, velometers to measure air velocity, and smoke cubes to establish air flow patterns.

But again, when in doubt regarding adequate control measures, the situation is referred to the specialists in the occupational health branch for further investigation.

25 Capacity for inhouse training and consultation on occupational health problems was added to the branch in 1976, by the transfer of occupational health branch engineers to positions within the branch.

30 Just by way of example, our chief engineer who is now presently the deputy director of industrial health and safety branch, has, since 1977, has more than twenty years experience with occupational health.

THE WITNESS: (cont'd.) The other regional engineers have taken post-graduate training in occupational health courses offered at universities.

Six university graduates have undergone a training program in the branch, which included inspection duties and access to university post-graduate courses in occupational health, and they are now fully-qualified inspectors.

Many of the inspectors that the ministry hired for so-called extended coverage facilities have also completed formal university training.

The present legislation: To date, specific regulations pertaining to asbestos are not yet in place, and briefly the history of guidelines for asbestos exposure recommended by the occupational health branch...and without repeating, or maybe I should just...it's the same material that Mr. Rajhans presented yesterday...but basically, in a nutshell, from 1975 to the present, the limits have been two fibers per milliliter, with a special limit of point two fibers per milliliter for amphibole, which includes crocidolite asbestos.

In 1972, the limit was two fibers for milliliter for all asbestos, down from five fibers per milliliter in 1970.

In 1968, the limit was twelve fibers per milliliter, or two million particles per cubic foot.

Prior to 1968, and going back to the time period of 1947, the limit was five million particles per cubic foot, and these guideline levels adopted are in line with or ahead of the threshold limit values set by the American Conference of Industrial Hygienists for the period.

An inspector using the current legislation may issue orders to an employer under Section 14 (2) G of the Occupational Health and Safety Act, which states that:

"An employer shall take every reasonable precaution in the circumstances for the protection

THE WITNESS: (cont'd.) "of a worker".

5 Under Section 146 of the Revised Regulations of Ontario...those are the industrial Regulations..."To take all the necessary measures necessary to control a worker's exposure to toxic agents."

10 That means, in the case of asbestos, using the time-weighted average of asbestos of two fibers per milliliter, which is a guideline criteria, for assessing the worker's exposure.

15 Now, when orders are issued and there is a delay in compliance, an inspector may do a followup at any time, and if no confirmation of compliance through a computerized system has been received, the employee (sic) is sent a followup letter in thirty days.

20 An inspector, in making a followup call to check on uncompleted orders, depending on the situation may, number one: reissue an order, issue an order under Section 29 of the Act to stop the use of the process or the machine, or three, recommend that charges be laid by our legal branch.

25 Since 1981, since June of 1981, premises where there may be problems with asbestos have been identified and are coded for input into a computer record. A hundred and seventy-five locations have been identified under this activity, and for the period of ten months in a fiscal year 1981/82, two hundred and fifty-four orders under Section 145 of the Revised Regulations were issued in these workplaces. These orders cover workers' exposure to asbestos or other toxic substances. In two hundred and eight instances, confirmation was received from the employer that corrections had been made to comply with the orders issued.

30 Let me just clarify the point of the difference of two hundred and fifty-four and two-zero-eight. That happens

THE WITNESS: (cont'd.) to be a picture at a time at the end of April, 1982, and it's always the case regardless of whether the orders are asbestos or not, there's always a lag period of followup required, so as new orders come on, past ones get dealt with, so there is always a lag period.

New Regulations: the proposed Asbestos Regulations will have more clearly-defined exposure limits and provisions, and expected - an implementation of the new Regulation can be more effective and will be more effective than the present use of guidelines and Section 145 of the present Regulations.

The program planned for monitoring implementation of this new Regulation involves some very basic data - the names of the firms, their locations, their file numbers, number of employees, existence of a union, the existence of a joint health and safety committee, the cycle of inspection, the assessment of exposure, the status of a control program and a medical surveillance program, all the outstanding orders issued for assessment control program or reassessment, and also the involvement of the occupational health and safety branch.

This program is already in place to monitor the Lead Regulation, which I mentioned earlier, which is in place, and when the Asbestos Regulation comes on line, we will have gained the experience to enable us to fulfill our role in dealing effectively with this toxic substance.

MR. LASKIN: Thank you, Mr. Melinyshyn.

Can we, for our own records, give your written statement an exhibit number - exhibit fifty-nine.

EXHIBIT # 59: The abovementioned document was then produced and marked.

MR. LASKIN: Q. Just on the last point of the new regulations, as I understand the way the proposal is written

Q. (cont'd.) that Regulation will not apply to the construction industry?

5 THE WITNESS: A. You are correct. The intent of the ministry, and it was brought out somewhat yesterday, with the construction is somewhat unique in that the stability that I guess is enjoyed in the industrial scene doesn't exist, and conventional monitoring and hygiene approach to trying to measure and build up a record that way wouldn't be applicable, so the ministry has, and I think with the consent of all parties, including labour and construction, been pursuing a course where they will be procedural-type regulations that will be clean cut. Again, the industry is unique because of competitive bidding process, and every one of them would like to see the regulations out front and without the time-weighted average aspects that are required under the industrial regs.

10 Q. Can I ask you this? Drawing on your experience as acting director of the construction health and safety branch, can you tell us what legislation and what regulations apply to the control of dust, such as asbestos, on construction projects at the present time?

20 A. I can't quote them offhand, but they are under the regulations.

Q. Under what regulations?

A. Oh, they would be the regulations for construction projects, and that would have been six fifty-eight, seventy-nine.

25 Q. Is that six fifty-nine? Is it then Ontario Regulation 658-79, Regulations for Industrial Establishments?

A. No. No, there's a separate set of regulations for construction projects, and then it's 659-79. It's the Regulations for Construction Projects.

30 Q. Okay.

A. The ministry has three sets of regulations - one for mining, one for industrial and one for construction.

Q. I take it as well certain provisions of the Occupational Health and Safety Act?

5 A. Very much so. I think it's fair to comment, too that in construction the ministry did produce some very meaningful guidelines that...just by way of an example...that's the nature of it and it was issued in October of 1981. The biggest dilemma in construction was getting people to become aware of asbestos as a problem, so these guidelines were prepared as stated here, until the regulations were in place proscribing asbestos as a designated substance, and the whole industry was provided with these guidelines.

10 Q. All right.

Are you at all familiar with either of the studies that Professor Doern has done for this Commission?

15 A. I read, with interest, his last one. Yes.

Q. Is that the one on Implementation and Regulation?

A. Yes.

20 Q. All right. One of the points that he makes in that study is that the inspectorate within the ministry ought to assume more of a policeman role in the construction field, as opposed to the industrial field, and the nonfixed site as opposed to the fixed-site workplace.

Can I ask you, is that the philosophy of your branch?

25 A. I'll qualify that. When you say 'my branch', the industrial branch now, or the construction branch?

Q. Let me ask you to wear both hats, since you have had both hats since 1981?

30 A. Okay. Let me start with the construction. I guess I firmly believe, because of the nature of the industry, because of the dynamics of the changing workplace, the work force which is very dynamic, too - there is the change from morning to afternoon - that the strategy, if there is one, is a firmer

5 A. (cont'd.) hand with respect to orders, and again, any other steps with respect to stop work or laying of charges in the construction industry.

10 If I might switch now to industrial, if I can, I think I agree with Doern in his report that basically government is a facilitator, but I think that there is one part that I don't agree, and I think he makes the statement that prosecution and penalties are the least likely to secure sustained desired change in behaviour.

15 Q. I think the point he makes, and just so I can have your complete answer, as I understand it the point he makes is that his perception of the ministry was that the ministry viewed prosecution as evidence of regulatory failure - at least certainly in the industrial side.

20 A. That was another point I would not agree with. I don't think that the ministry would view this as regulatory failure. I have some thoughts on it. I think that the three parties involved - both labour, government and management - have very much an interactive role, and the key to the role...if I may just take...can I put a sketch on the board?

Q. Sure. By all means.

25 A. I think the three actors that are here...I think we have government, management and labour, and there's very much, the three are inter-related and have a relationship as outlined by the Act.

30 I think the whole internal responsibility system is built on a very strong link at this level...between management and labour. One of the thoughts...and I think this gets back to the kind of statements 'what role has government', and initially with the Act coming in place in 1979, my own feeling is that these links should have been strengthened, especially in the initial outset, and that this possibly is something that will come

5 A. (cont'd.) along in time between management and labour, but there still is a very strong role for government, through an effective inspectorate, that it can play in its part and really facilitate ultimately the self-compliance that is suggested through the internal responsibility system.

10 Q. Are you saying by that that perhaps in your judgement, at least on the industrial side, the government perhaps withdrew too quickly, or to use a colloquial expression, handed the ball away too fast?

A. I would suggest it didn't hand it away...perhaps hand it away. It could have played a stronger role right from the outset, especially through the initial time period.

15 Q. Would you agree that the ministry has been more willing to prosecute on the construction side than on the industrial side, to date?

A. I think it's evidenced from the point of view of willingness and actual example. You are correct.

20 Q. I guess the problem I have, and I'll put it up front to you and invite your comments, is this: Where does one draw the line between what I perceive to be the obligation of the ministry to administer the Act, and if there have been infractions, then to deal with those infractions where do you draw the line between that on the one side and your willingness to prosecute on the construction side, and perhaps your greater desire to achieve some sort of voluntary compliance on the industrial side?

25 A. The line is not easily drawn, but there are ways and one of the obvious ones is to develop a sound prosecution policy, which I mean, not being heavy-handed or anything, but having an approach...for example, I think one of the biggest criticisms is the repeat orders...how many times do orders have to be repeated before some action is taken.

30

5 A. (cont'd.) Again, without, you know, making it
a mechanical process...and I don't think any one of us want to
see that...but again, there has to be some discretion, I can see
tackling the thing from a point of view of reviewing the
prosecution policy, taking a look at the severity of possible
injury, and that should again influence the prosecution policy
or whatever steps - for example, a more effective one is a stop-
work order which just plays havoc in an industrial scene where
10 production work is involved.

So there are different methods, but that comes back
to an approach to prosecution and stop-work orders.

15 Q. Just on that point, as I read Doern, another
one of the points which he seemed to make was that he couldn't
find any prosecution policy. I suppose my question to you is,
is there a prosecution policy within either the branch you
now administer or the branch that you previously administered?

A. In all honesty I have to say, yes, there is one.
It's in the manual of operations, which we have a copy here.

Q. Could you produce it?

20 A. I happen to have extracted it.

Q. Good. That's helpful.

Can you, number one, make it available to us, and
secondly, so that we are all at the same level you are, perhaps
just briefly summarize what it is, orally, in your evidence?

25 A. I most certainly...yes, it's available, it's
part of the Operations Manual under potential prosecutions.

There...well, let's not get into that. There's
the description of how the legal branch plays its role with the
inspectorate and our regional managers, the procedure of making
recommendations to legal, but basically the situations where
prosecution...and I'm quoting here...may be considered:

30 "In the case of a single contravention where there

A. (cont'd.) "is a high risk of maiming, where it has the potential of catastrophic consequences".

What that's really saying is, on the first contravention, on the first order...and again, the analogy in construction - they have the same type of policy. For example, their situations - power line contacts, a man being in a deep trench - it means automatic prosecution on the first contravention.

Q. Can you give us an example that might relate to occupational health as opposed to occupational safety?

A. I would...the possible meaning - this is industrial - where we are talking about machinery and guards, that to me is a possible area, and I'm not saying that this has been done or is being done now, but that has the potential of maiming and we should really consider that as a serious offence on a first contravention.

Again, when you have repeat contraventions, when the worker is at some risk and is exhibiting...the employer is exhibiting a poor attitude. What I mean here is, we are finding that we keep coming back and there's a certain amount of indifference, or that there is a flagrant disregard of orders or past orders. Again, a repeat contravention that may have the high risk of maiming, again should not tolerate succession of repeated orders.

The third category as listed here is where maiming has occurred, and this is where someone has lost a finger or a limb or whatever, and if we find that there has been poor employer attitude if this does occur, that would constitute prosecution.

The fourth one is the actual catastrophic consequence again, where something more serious occurs, and it could be the very first time that an employer had exhibited a

5 A. (cont'd.) poor attitude or possibly had a similar type of contravention in the past. That would mean prosecution.

Q. Is that policy intended to apply both in the industrial branch and in the construction branch?

10 A. This policy is the Operations Manual for the industrial branch. The construction one is a little more specific because it actually deals with the nature...again, remember I mentioned procedural...it would mention certain types of contraventions like the power line contact, the trench contravention. These are first-offence charges.

15 Q. From your experience in the construction branch, is the repeat order a frequent or an infrequent occurrence?

A. Did you say the construction branch?

Q. In the construction branch.

20 A. In the construction branch, after being asked and we did a little research on it, the repeat order, surprisingly enough, came up close to eight percent of the orders that were issued.

25 I should qualify that, because I see it may raise a few questions. What happens in construction, as one may see some of the buildings downtown here, if the contractor does not have guide rails on the second floor, and we leave an order and we come back and we find he doesn't have guard rails on the fourth floor, and the sixth floor or the eighth floor, these end up showing as being repeats.

Now true, they are under the same section so they keep spitting out. It may not be the exact same circumstances.

30 Q. How does that frequency compare with the frequency of repeat orders in the industrial branch?

A. I think it would be best left in the past, to

5 A. (cont'd.) my predecessor, who may comment on that. I would only be guessing if I had to take...I would not be aware of the figure in the time I've been there.

DR. DUPRE: To make sure I recall your construction statistics, it was about eight percent of orders were repeat orders?

THE WITNESS: As I recall, sir. Yes.

10 MR. LASKIN: Q. When you use that figure, does that mean it could be a second repeat order, it could be a third or a fourth repeat order?

THE WITNESS: A. It could. It's more than once.

15 Q. You haven't got a grasp on any comparable statistics, yet, from the branch you now administer?

A. I would only be guessing, and I think in all fairness it could be commented on later.

Q. Could I just...could I see that document that you just...for a minute?

20 What is, because maiming is used consistently throughout this, what is intended by the use of that term?

A. I guess in the industrial scene, there are a lot of instances where people lose parts of fingers, parts of hands, this type of thing. It's usually a limb that gets maimed.

25 Q. All right. Can I put to you...I'm just looking at this document and I'm going to make it available...but coming back to the question that I originally asked you, which sprang from one of the questions I asked you, or sprang from Mr. Doern's observation that prosecution was viewed as a last resort, and when I look at item number one, philosophy, under this Operations Manual, it indeed says: "Prosecution will be used only as a last resort"?
30

A. That's correct.

5 Q. So can you reconcile what appeared to be your previous evidence, which seemed to express a view differently than that, with what appears in this Operations Manual?

10 A. I think the philosophy is saying, 'being a last resort', let the point of discretion be used - especially by a manager when his officer reports back to him - to know which is the most effective means, whether it means through consultation, sitting down with management, sitting down jointly with management and labour..I think it recognizes that it wouldn't be the right approach totally to let it come to a hard-and-fast prosecution policy. I would hope that, again within, you know, that term of reference, the discretion would still be used, but there still is room under the policies that we have to take possibly a little harder stand.

15 DR. DUPRE: Counsel, may I just ask, is that document that you are looking at the prosecution policy of the ministry, or the prosecution policy of the industrial branch, or the construction safety branch? Is it the policy that's common to all branches? That's really the...

20 MR. LASKIN: I think the witness's previous answer was, it's the policy for the industrial health and safety branch.

DR. DUPRE: I see. That is the policy for the industrial health and safety branch?

MR. LASKIN: Yes.

25 DR. DUPRE: Presumably, we may be able to have a look at, some time, the policy for the construction branch.

THE WITNESS: Most certainly.

MR. LASKIN: I think it might be helpful if, perhaps you through Mr. Lederer, could undertake to produce that for us.

THE WITNESS: A. I will.

30 Q. All right. Can I just come back to one other question, and as I look through the situations which are indicated

5 Q. (cont'd.) in the manual where prosecutions might be considered, they seem to have a...they seem to speak more to accidents on the job than they do to industrial disease. I guess my question is, does the inspectorate get any specific instructions from the branch, or specific information, as to how this kind of policy might be applied to something like asbestos, which produces occupational disease, rather than specific, discreet accidents?

10 A. I think I agree with you that it is very heavily focussed on safety aspects, but the special direction that we get comes very much from the recommendations of the final report of the occupational health and safety branch, and that could occur with lead poisoning, asbestos, or whatever.

15 Q. So will that branch, then, in its report to you, make some recommendation as to prosecution?

A. They will make recommendations primarily on contravention - have the time-weighted averages been exceeded, they may take the form of recommendations, suggestions, advisement, this type of form.

20 Q. How do you then translate that kind of recommendation that, say the TWA has been contravened, how do you translate that into a decision as to whether or not to lay a prosecution?

25 A. Well, again, our managers and inspectors, because the whole regime is decentralized, have direct access with either the hygienists or the physicians that are involved, and they actually translate that in a form of an order, and the officer goes back and issues orders.

30 Our problem has been that the order, as I mentioned, if it had been asbestos it would have been only under one forty-five, which is a very general regulation. We now have the cases we have been doing with lead, for example, we now have the new

A. (cont'd.) regulation for lead, and we use direct sections out of the regulations.

5 Q. Have there been, since you have been at the branch - since you have been either at the construction branch or the industrial branch - to your knowledge, any prosecutions involving asbestos?

10 A. I can honestly say that in the time I've been there I do not know of any prosecutions in the case of asbestos, although orders were issued in both construction and industrial. These were never taken.

15 Q. Are you aware of, since the time you have been there, of any prosecution involving any of the other hazardous substances or proposed hazardous substances under the statute?

A. I guess the dilemma has been the actual presence of regulations, and in the case of lead these are being pursued because we now have a regulation.

20 But as for the other substances, I cannot recall, because we have always used the Act and the general regulation.

25 Q. Can I ask you, Mr. Melinyshyn, about one of the other observations that Professor Doern makes in his study, and it concerns the capacity of your inspectorate, and to put it very briefly, as I read Professor Doern, he is suggesting that the statute, and indeed the responsibilities that the inspectorate is being called upon to play, really require some - and I think you use the word heroic, some very heroic assumptions and expectations as to their ability.

Having read Professor Doern, do you have any comments of your own on his observations?

30 A. I have read, and I remember reading that article. I have occasion to...we have had visitors from other countries coming and obviously looking very much at this province

5 A. (cont'd.) and the inspectorate, and looking
at the capability of our inspectorate. The first comment seems
to be that we should really be trying to get our inspectors up
in being knowledgeable of all aspects of safety and in health
matters. I think that our ministry has taken an approach which
really says that our inspectors will be trained to identify, will
be trained to know the legislation, will be trained in the process,
10 but will very much depend on the specialist.

As I mentioned before, the specialist could be
a physician, an engineer, a hygienist, and again I reiterate
that these people are in the same offices distributed through the
province and rather than trying to build up heroic inspectors
and being a man of all seasons, I think what also warrants
15 comment is that the rate and the progress of toxic substances,
the day will never come that in a province that stretches a
thousand miles to the border and has the kind of differences
and complexities, that we'll be able to have an inspector that
can handle all cases.

20 So in a way, I would like to say I agree with one
part of Doern's comment on the same subject - that the specialists,
and this is OHB for example, they should be on top rather than
just on tap, as he referred to it. But I still think that there
is an administrative process, that we should have a single window,
and that our inspectors do form that role and have access to the
specialists whenever they need be, and should not...and the day,
25 I doubt, will ever come that we can train our people to do all
of the functions necessary that are required by either physicians
or engineers or hygienists.

30 Q. When you say you agree with Doern to the extent
that you think the occupational health branch should be on top
rather than on tap, as you put it, do you mean by that that you
contemplate that that branch should play more of a front-line

Q. (cont'd.) inspection role in even identifying health hazards at the workplace?

5 A. I was a little concerned yesterday that the message that was coming across that the branch was totally one of being passive and being called in only, and I think that there is still very much a role that I know that we as inspectors depend on - for example, the information that comes out of the Workmen's Compensation Board, things like lead poisoning. Somebody
10 has got to be monitoring that and pick it up, so there is a very active role that OHB can play that it takes, again, as these little reports come over one at a time, our inspectorate isn't really fine-tuned to that.

Now, OHB can pick that up and then take the initiative. Now, it may very well in the end involve our
15 inspectors to do the so-called issuing of orders, but that's a role that I think that I agree with him when he says being on top, because quite frankly, again our inspectors just aren't geared to being on top and interpret WCB data that comes out on isolated cases of asbestosis or, in the case of lead, poisoning, and that's what I meant by being on top.
20

But still in tune with the single window that the inspectorate can really...see, it isn't just the first order, there's the followup. You get subsequent refusals to work and it becomes an administrative nightmare if you suddenly have very different bodies coming in and issuing different orders,
25 so I think a single-window approach is still the right one.

DR. DUPRE: I was wondering if I could just pursue that with you, Mr. Melinyshyn.

I take it from looking at page eight of your opening presentation that the industrial branch has been doing what it can to do justice, perhaps, to some of the heroic
30 expectations, or at least tailor those heroic expectations of

5 DR. DUPRE: (cont'd.) the inspectorate to reality, because I note especially at the bottom of page eight that your own inhouse training capabilities with respect to occupational problems has been coped with, in part, I gather, by taking some occupational health branch engineers - by which I would take hygienists - and actually putting them into the industrial health and safety branch for the purpose, I gather, in part, of providing some occupational health training to the inspectorate?

10 THE WITNESS: That's correct.

15 DR. DUPRE: Let me see if I can also wrap my arms around this. I gather, again from page eight, that quite aside from any inhouse training, you have some extramural training, in that I see that ninety-four inspection staff, over five years, attended occupational health courses at...oh, I see, oh, no, that is followed by...

THE WITNESS: No. It's still a term, sir.

DR. DUPRE: ...either the occupational health branch or Humber, so that's both?

20 THE WITNESS: That's both.

25 DR. DUPRE: Okay, now. Bear with me for a moment so that I can try to roll over in my woolly little mind what this means. I take it on page one that the branch has a complement of a hundred and eighty-seven, of which, I gather, there are a hundred and twenty-six front-line inspectors.

Now, over a five year period I suppose you have had some degree of turnover, probably not all that high, but we might be looking at a total inspectorate work force of say something like a hundred and eighty?

THE WITNESS: Yes.

30 DR. DUPRE: So that if I put the statistic on page eight into that context, it would look as if roughly half, ninety-plus, roughly half of the inspection staff would have

DR. DUPRE: (cont'd.) had occupational health courses either given by the branch or by Humber.

5 Now, that leaves us with the other fifty percent. Would the other fifty percent be inspectors of such long-standing that they would have already had their training?

THE WITNESS: I think you would be fair in your assumption, sir, that the other half at least had very little.

10 DR. DUPRE: Had very little.

And at this point, I suppose, to the extent that one would want to depart from Professor Doern's outlook, which really seems to be to look to the occupational health branch to provide the health inspectorate, that one would have to, I guess as a minimum, be thinking of trying to bring the health training of all the industrial branch inspectors at least to the level that has now been reached by the ninety-four who have gone through that. Would that be...

15 THE WITNESS: Can I comment?

DR. DUPRE: I really would like you to comment, please.

20 THE WITNESS: I wouldn't like to leave the impression that even half of the ninety have had possibly the kind of training that you have in mind, that would really qualify them. I think if one can remember that my earlier statements, that the inspectors, the training they are getting is only to identify...

25 DR. DUPRE: Right.

THE WITNESS: ...and recognize the situations.

30 The specialists that we have periodically, for example, the latest thing was urea formaldehyde, so whenever we have branch meetings, we get a person to come out for four hours and talk about urea formaldehyde - where it can be found, what does it look like, what are the steps you should take and when

THE WITNESS: (cont'd.) to call people in.

5 So it's by no means...I would rather not...I hope I didn't leave the impression that these people are in any way qualified to be, you know, equal to a hygienist. They are just getting some basic recognition data.

10 DR. DUPRE: Oh, no, I wasn't suggesting either that you would, in twelve weeks, be able to...or whatever the period is...be able to upgrade them to the hygienists. That's not what you even want to do, if what your job was to maintain the window on the overall industrial environment.

15 So that the whole purpose, though, of the training, as I would understand it, is simply to sensitize the inspectorate to a workplace situation in which health would be an issue, at least to the point where they would know that the occupational health branch should be called in.

THE WITNESS: Exactly, exactly. That applies because they take courses on guarding machines, offered by IPA, to that's a sensitizing, as you say.

20 I think there's more than can be done, and as long as it's recognized that we aren't trying to make them the actual specialist or quasi-specialist, but have enough education and knowledge to know when to spot something and call the people in.

25 DR. DUPRE: And at this point, though, it would remain valid to say that within the present, if you will, envelope of training efforts that are made to provide the inspectorate with the kind of health know-how at the level that we have just agreed to, well below the level of hygienists, but enough to recognize health workplace situations, we are looking at a situation where it's only about fifty percent of the inspectorate that's gone through that?

30 THE WITNESS: Yes.

I think this also relates to the fact that in the

5 THE WITNESS: (cont'd.) time period we are talking about, over the past few years, it is possible that safety might have still had the high emphasis, and now that we are getting into health that it would be a restructured type of course or education process that they have to go through.

10 DR. DUPRE: Since you have also been wearing a construction hat so recently, are we looking at a similar situation in construction, with respect to the capacity of the inspectorate to detect possible health, as opposed to possible safety, problems?

15 THE WITNESS: I would agree with you. I would even say it would be a little more, so it goes back to the background that our inspectors have. In construction, basically these people were field superintendents in construction, and I guess at the most they would have been safety-type hazards rather than the health hazards.

20 I think that the strength that the industrial branch may have now is obviously a lot of the inspectors have a background of shop, sort of floor superintendents, but at the same time we have been picking or hiring people who have had, again, a different age group and a different background in today's society, and they are a little more cognizant of the hazards that are out there.

25 MR. LASKIN: Q. How do you place your inspectors in terms of workplaces? Is there a rotation system as to the specific workplaces that any particular inspector may have responsibility for?

30 THE WITNESS: A. I guess if I may just generalize, they are both in construction and industrial, they are divided into districts or small areas or whatever, and within that the manager or the inspector can get a timetable to look at optimizing the visits and the rest of it, and the frequency, but in both

THE WITNESS: A. (cont'd.) cases there is rotation, if possible, without having to move people physically - where they switch around after. Within a two year period, generally speaking, there is a change just to guard against the over-familiar situation.

Q. I heard Mr. Rajhans evidence yesterday that so far as he was aware, no advance warning was given to any workplaces concerning inspections, and indeed can I ask you is that in fact the policy?

A. It is the policy, yes. But at the same time, we are very much aware that there is a perception that in certain places, in certain locations, the floors are tidied up and eye protection is handed out in anticipation of a visit.

Q. How does that perception arise? Is it because of the cyclical review nature of the inspection, so that employers can make a calculated guess as to when you are going to show up?

A. I can't believe that we could be so accurate in our cycles that that would give that away. I think there is a bit of perception, too, that sometimes labour sees the inspector coming and walking into management's office as the first step, to say I'm going to be inspecting your place, and he spends a half an hour there without labour representative or employee representative, and I think these are possibly...the way we do things there might be room for it to be subject to some improvement.

I'm not sure if I answered your question. The policy definitely is surprise, but it doesn't always work out.

Q. Are any inspections done after normal working hours?

A. Let me start by construction. In construction we have had cases, for example - asbestos removal by TTC in the subway, and that's the only time it does occur, so they do take place.

5 A. (cont'd.) Investigations very much do, when something happens or there is a complaint and they go beyond, obviously beyond working hours.

In industrial, I guess in my experience I may have to defer that, but most cases because of the same..the scene is stable and in most cases it's shift work and it goes around, or production, we generally have the representatives and all parties present during normal working hours.

10 Q. You tend, I take it, in industrial not to get any graveyard-shift inspections?

15 A. Well, as I think someone mentioned, the industrial scene is stable and how can you switch it from one to the other. The construction can be, you know, demolition, removal of radioactive material. Obviously these are things that happen possibly outside of regular working hours.

DR. DUPRE: On that, I was wondering if by any chance you had the opportunity to read the other commissioned study by Swimmer and Luce, which is a study of three asbestos plants in the province?

20 THE WITNESS: No, I haven't, sir.

DR. DUPRE: I commend that study to you, because among other things it does suggest that in fixed-place industry, and this may be quite relevant to the health situations, there are certain operations which it may turn out for matters of convenience, scheduling or any of a number of other reasons, will be carried out on the graveyard shift or some similar shift.

25 THE WITNESS: Thank you.

MR. LASKIN: Q. Can I just...I'm sorry, Mr. Chairman, are you finished?

DR. DUPRE: That was my publishing house publicity pitch for this morning, thank you.

30 MR. LASKIN: Q. Can I just change the subject

Q. (cont'd.) slightly, Mr. Melinyshyn, and can I just...I just wanted to ask you a few questions about the refusal to work provision as it relates to a substance such as asbestos, and what I would like to do, if I could, is take advantage of your position and if you could tell us what the process is...and I'm trying to find out what the process is of a work refusal, and the involvement of your branch, and how long it takes to deal with that kind of situation.

So I take it...let's assume there is a work refusal and it hasn't been resolved at the health and safety committee level, and one of your inspectors is called in.

THE WITNESS: A. Okay. And again, I'll of course just speak possibly generally and pick up construction, or industrial, and I could probably cover examples like, you know, we have had a lot recently where women who are expecting are very concerned because of radiation from VDT's, and I think that...whether it's asbestos.

Generally the first contact is by telephone, and one of the responses that we try to ascertain because there are some very definite procedures in the legislation to be followed, and that is where the person who has a complaint or is taking the stand or refusal has really spoken to a supervisor, and the supervisor has taken the representative, the worker, and taken and done a little investigation of his own, and then if the particular individual still he wants to refuse, that's when we come in.

Again, the operational manual has a lot of detail on questions to be asked as our inspectorate comes on board. He first ascertains from the worker the reasons for his refusal, he brings in the management, he looks and does the investigation...and why I begin with the subject of asbestos or radiation, again because of the nature of our inspectors, in

A. (cont'd.) many cases they do not have the necessary, all the necessary details.

5 For example, it may very well be that OHB is called in immediately, and that's just by phone call, or they could almost come simultaneously and take either the air quality testing, or samples, or for example the radiation of some of these VDT's, and let's take the case that the decision can be made right there - the inspector has to make a decision on whether the individual,
10 whatever the circumstances were, where it was likely to endanger the worker, and that decision then is made by the inspector. He may have to wait some time...

Q. That's what I wanted to get at.

A. Okay.

15 Q. If we are talking about asbestos, and let's say the work refusal is, for example, based on the judgement of the worker that the TLV or the time-weighted average guideline is being seriously exceeded, I take it in that situation the inspector can't make the decision right on the spot, and he needs some assistance by way of sampling or air measurement...

20 A. Or dust, yes.

Q. ...from the OHB.

A. Right.

Q. All right. So does that happen?

A. Yes. Oh, yes, it does.

25 Q. What's the time lag between the OHB coming in and doing that sampling and getting the results back to the inspector?

30 A. The time lag is very small from getting OHB in - remembering that these people are decentralized, that they could be launched almost simultaneously with the inspector at the same time, what does take time possibly is to get the results tested, and in that case if we speak with respect to

5 A. (cont'd.) asbestos, and if I may comment on, again, the construction role, the philosophy has been, not knowing whether it's asbestos or not, you assume it is and therefore there could be orders left right there that the operation ceases while the confirmation is made whether the material was asbestos.

10 So the inspector then has within his bag room to make orders to cease operations, and yet at the same time not offer the decision until he has all the information in front of him.

Q. You said it takes time for testing. What are we talking about, a week? Or...

15 A. Offhand, in the case of refusal to work and investigations, it's my understanding that in our case and OHB's, that is the highest-priority work and overrules.

I can't recall very many of them going past a week, to tell you the truth.

20 Q. But let's say, let's say a week or five or six days is a reasonable estimate to get the results back and so on, what then is the practice in the workplace for that five or six day period? What does the worker do and what happens at that work site?

25 A. In most cases, alternate work is found for the worker. I'm just saying, as examples, if it had been construction work and if we thought it was asbestos, that part of the, say demolition or remodelling or renovation, would be stopped and work would not go on. If it had been a young lady working on a machine, every effort...and this is where the industrial relations skills of the officer come in, to get management to try to take the worker, put them on other work so they don't lose time.

30 What I'm getting at, there is room here to do some negotiation and have the work either cease and the people

A. (cont'd.) find alternate employment.

5 DR. DUPRE: Can I ask a question at this point, and again I'm bearing in mind that you've been wearing a construction hat, and you now have an industry hat, have you... has your experience caused you to be sensitive to the capacity of the, to the linguistic capacity of the inspectorate, to their capacity in particular to deal in, for example, in southern Ontario with workers who are primarily or exclusively Italian-speaking, Portugese-speaking, Spanish-speaking?

10 THE WITNESS: Yes, sir.

DR. DUPRE: What kind of capacity, linguistic capacity, do the two inspectorates have?

15 THE WITNESS: Well, if I may comment in construction, it's very obvious that the work force is Portugese/Italian, and I think one of the biggest concerns, if I may say, is we do receive, and we did receive, anonymous phone calls, and anonymous phone calls are such that they are basically almost unable to speak English at all, and I think the reason it's very anonymous is that in the construction industry
20 almost sixty percent of these people are unorganized, which do not have the strength of a union supporting them.

25 When we receive these, we treat them as anonymous. We have managers that speak the language, and Italian is one of the primary ones, and again, leaving all the details with the manager, again within an hour, and all we need to know is the location without any mentioning of where the complaint came from, our inspector will be launched to look into it.

Some of them are absolute horror stories. Some of them are very valid.

30 But again, I don't want to imply that we keep a whole batch of interpreters on board, but again, recognizing the kind of people that came from construction, we have the

THE WITNESS: (cont'd.) mixed languages.

5 We have things like the Act and Regulations in construction published in different languages. They are posted, and I'm not suggesting that people even read them, but they are there.

DR. DUPRE: So I take it from there that I could take it that there is a degree of linguistic sensitivity in the construction branch.

10 THE WITNESS: In construction.

DR. DUPRE: What could be said in this regard with respect to the industrial branch?

15 THE WITNESS: In my brief period here, I would suggest that it isn't the same. Most of it's English, although I shouldn't...we get letters written in and they are obviously in another language, and we get them translated. But I don't think the same problem exists as we have in construction.

20 DR. DUPRE: Well let me do my publication publicity again, and simply make the observation, Mr. Melinyshyn, that you won't be able to lay Swimmer and Luce down once you have picked it up, because they in fact in one of the three plants that they looked at in detail, it turned out that they were looking at almost entirely a nonEnglish-speaking labour force.

25 THE WITNESS: I guess this gets back to the problem we have even with asbestos. Again, I seem to have found in construction that we had tremendous response to the guidelines, which again didn't have the legislative clout, and what really... where we had the problems was the awareness, and it gets back to this, whether it's a language problem, whether it's an awareness of the dangers, but...or again, precedent of trying to keep a job over the dangers that aren't apparent because they are so latent.

30

THE WITNESS: (cont'd.) But the success of a lot of this depends on communication, and again, a little thing like that bulletin, it had a coverage of over seventy thousand distribution, and it started to pick up the small contractors who were just unaware that asbestos was a real problem.

That gets back into communication and language.

DR. DUPRE: Could I just try out a hypothesis on you, and tell me if it's wrong or if it holds a little water. The hypothesis that I would try out on you is that it would probably be easier to recruit inspectors in the construction branch who had the experience in the construction industry, and also had the range of language abilities, than it would be to recruit similarly-experienced personnel with those kinds of language skills on the industrial side, on the fixed-place industry side.

THE WITNESS: Okay. Just to make sure I understand this clearly, it would be easier in construction to take people with a construction background and who have the skills and different languages. It may not be possible that any one inspector may have any more than two or three, but for sure whether they be Portugese or Italian, that would be much easier than I would suggest that we would get in the industrial. Yes.

I don't quite perceive the problem in the industrial scenario. I think there is more representation by unions, I think there's a stable work force and the same demands aren't there that the sensitivity of a language problem really isn't as acute in the industrial scene as in construction.

MR. LASKIN: Can I suggest...I don't think I've got any more questions, but I'll just review my notes and maybe we could take a short recess?

DR. DUPRE: Shall we take our recess until, say quarter to twelve?

MR. LASKIN: Sure.

THE INQUIRY RECESSED

THE INQUIRY RESUMED

DR. DUPRE: Counsel, proceed, please.

MR. LASKIN: I just have one or two final questions, Mr. Melinyshyn.

Q. Can I just come back to the question of prosecution for this one question, and I don't mean to belabour it, but I suppose if I put on my litigation hat for a moment and someone came to me with two possible prosecutions - a prosecution for an alleged contravention by reason of the happening of some accident, and a prosecution for an alleged contravention of the statute by reason of dangerous exposures or unhealthy exposures involving a hazardous substance, I think I would probably find the first one a much easier case to prosecute and hopefully obtain a conviction.

I am just wondering whether, if my perception is right, whether the sense of some difficulty in obtaining a conviction under the Statute, where you are dealing with a hazardous substance as opposed to discreet accidents, has any influence on the attitude of the ministry in prosecution?

THE WITNESS: A. I think your perception is correct. I would like to think that it shouldn't influence the case whether we take the steps and pursue prosecution. I think that may influence the nature of the penalty or the fine, quite frankly.

I guess I shouldn't make it so personal, but we have...and I guess with due respect to your profession, our legal people are in a position to make a statement on whether the prosecution has grounds for success, and we have on occasion, on

THE WITNESS: (cont'd.) several occasions, especially where there has been a certain amount of...I shouldn't
5 leave the health aspect, but let me just deal with the other
first...where there was a serious contravention and again, the
way the policy states is that the director has the last say on
whether charges should be laid, and we have written back to our
legal people saying that it's not a matter of winning or losing
10 a case, there has been a contravention and we really believe it's
in the best interests of all parties that this should be dealt
with in court. This has occurred.

Let me just back off one more step. In the
preparation of material for our legal counsel's consideration,
we do look back and take a look at past contraventions and
15 possible past convictions, and again, I suggest to you that
this makes a difference in more the fine or the nature of the
penalty, more than possibly the reason for going and taking it
to litigation.

I think I would have to agree with you that
normally where it's a demonstrated incident that has caused
20 either, you know, some infliction of pain or a fatality, that
this may have a stronger influence on the court than just the
contravention of a possible health issue that really didn't,
say, manifest itself in any visible injury to a worker.

I think I would agree with you on that point,
25 but that should not in any way preclude our pursuit of laying
of orders, taking of stronger steps, of stopping work or laying
charges.

Q. I don't know whether you are in a position
to answer, but let me just ask, do you have any knowledge, in
terms of penalty, and I'm just looking at the penalty of the
Statute which provides possibly for imprisonment, do you have
30 any knowledge as to whether the court system has invoked

Q. (cont'd.) imprisonment in any cases which have been prosecuted under the Occupational Health and Safety Act?

A. To my knowledge, no. It has been usually fines.

Q. And when we get down to fines, do you have any ballpark information as to the kind of monetary amount that is being assessed, and I guess what I'm really getting at, are the courts assessing something that is the cost of doing business, if you will, to put it in our terminology?

A. I would have to say no, because the maximum being twenty-five thousand is hardly, in today's terms, you know, the cost of...say, there's a fatality involved. I know of fines that did reach ten thousand. I can remember an analysis we did in construction on fines, and the average set of fines, again in construction now, against industry were in the magnitude of somewhere around two to three thousand dollars as an average fine for industry, a fine against a supervisor was in the neighborhood of several hundred, two hundred, three hundred dollars, a fine against a worker averaged out just over a hundred dollars...in construction, workers were also charged...so we have a category for worker, supervisor or industry, and that gives you a sense of magnitude of fines that are levied.

Q. Is your...can I ask you, is your policy...let's deal on the industrial side for a moment...is your policy to prosecute the company, the particular management person responsible for the alleged contravention, or both?

A. In all honesty, again, our charges are laid against all parties. There does occur, again, a strange thing that occurs with lawyers and when charges are, for example - the company is charged or fined, there's negotiations that take place, and these are withdrawn against the supervisor or worker.

Q. Indeed, I have some personal experience - not with prosecutions under your Statute, but for example prosecution

5 Q. (cont'd.) against Ontario Hydro, which was against both Ontario Hydro and the personnel involved, and as I understood the prosecution policy, it was if you could register a conviction against the company, Ontario Hydro, then the charge against the individual would be dropped. Is that the same?

A. This is very much the practice, yes.

Q. The same practice.

A. Right.

10 Q. And does that practice also pertain in the construction side?

A. Very much so.

Q. Do you yet have any estimate in terms of figures on the industrial side analogous to the fine estimate that you just gave us on the construction side?

15 A. I couldn't even guess. I haven't had a chance to look at it.

Q. Fair enough.

Laskin
20 Just one or two final questions about health and safety committees. Does your branch have sufficient feedback or information to be able to tell us, with reasonable certainty, that infact the health and safety committees have been established in all workplaces in which they are mandated under the Statute?

25 A. Again, I, from recollection, would like to comment that there was a statement made before I was there, that placed it in excess of ninety-nine percent of places that had had health and safety committees, had in fact health and safety committees, and possibly, again, Mr. McNair later on can comment on that.

Q. I'm sorry. I didn't...I'm not sure I understood your evidence.

30 A. My evidence was, and this is speaking of recollection of a statement made, that in the industrial

5 A. (cont'd.) scene that ninety-nine percent of the areas that require health and safety committees do in fact have health and safety committees.

Whether they are operating properly is another question, but we'll leave that.

Q. From your knowledge and information as acting director, do you agree with that statement?

10 A. I guess I can. I would agree, I guess the problem is the ones I do see are the ones that aren't, and I have no sense of relation to the whole picture, but it is possible that it is as high as that, yes.

15 Q. Where you see situations where there aren't health and safety committees, does your branch take any active role in promoting their establishment?

20 A. Our branch does because there are requirements for the participation and the kinds of procedures and some of the actions that a committee must undergo, but in all fairness, we also rely very heavily on some very professional industrial relations individuals that are employed with the Ministry of Labour, and I and this particular individual do sit down with labour and management to try and work out the proper structure, the proper working procedures, a set of guidelines for them that will make it work. So this has been happening very much over the past ten weeks that we have been in, yes.

25 Q. Do you get any feedback on how well they are working or how well they are not working?

30 A. The particular ones that we are involved in as problems? I must say again, in the short time that I have been there, the ones that have been put in place with a very visible, open lines of communication, drafting up jointly the terms of reference for the committee, the procedures and the structure - yes, there is a favourable feedback that they are working.

Q. Do you get unfavourable feedback as well?

5 A. Not too much. I haven't heard very much in the last...in the ones that we have actually sat down and negotiated with the parties, no. It takes time to get them to come around, to sit down and really, you know, put their thoughts down on a piece of paper, but for the ones that have been done, it has been favourable.

10 MR. LASKIN: Okay. Thanks very much, Mr. Melinyshyn.

DR. DUPRE: Thank you, counsel.

Mr. McCombie?

MR. MCCOMBIE: Thank you.

CROSS-EXAMINATION BY MR. MCCOMBIE

15 Q. I would just like to briefly followup several of the questions that Mr. Laskin was asking this morning, in particular the question that was asked concerning advance warning of inspections.

20 I noted that your response to that was that the policy is surprise, but that that doesn't always work out... I think I'm quoting you correctly...I'm just wondering why that wouldn't work out? I mean, what would cause it to not work out?

25 A. I really don't know why it would not. The suggestion has been that our cycle is clearly identified on the very first sheet of the inspection report which, as you know, is left with management and posted for employees. But again, looking back, they don't occur on the same day, it's within days.

30 Now that may be part of the answer, that we are so cyclic in our inspections that that may give it away. I'm not too sure that this is entirely a problem...I mean a real problem. We know that once we have been getting into some of the so-called institutional places like hospitals, there is a real thought that maybe we should advise both labour and management

5 A. (cont'd.) ahead of time, because we are talking about operating rooms and this kind of inspection, and there may be some merit - although we have never approached this yet - but there is some merit in even advising people we are coming so we can get access to the areas that we want, but again, with both labour and management involved.

10 Q. So your suggestion is that the reason it wouldn't work out is that it has been guessed in advance?

10 A. That's the only...I don't believe it's one of, you know, secret information or anything of that order.

15 Q. Well, you indicated as well in your response that there was a perception that you feel that, from workers, that things have been, in certain circumstances, prearranged and that the inspector's visit in the management office for half an hour...I'm wondering if you could just comment on whether you feel that that is a totally false perception and what can be done to correct that, or what your views on that perception are.

20 A. I honestly don't think it is a false perception. I think it's something that our inspectorate, our officers, our inspectors have to know that being a government representative they really have to walk that line between management and labour, and they should take very special steps even...and I'm sure that these are totally unintentional. I guess, you know, when you come into a plant, where do you go for first? Sometimes you have to check in with management before you start, but I have already advised our people...and you know, this goes on to who do you take lunch with after the inspection is over, and all the rest of it...and I just don't think that...there is the perception that's left, and I think even though it's unintentional, we should take some very definite steps and not let that perception exist.

30 Q. Just a point of clarification on an earlier

5 Q. (cont'd.) question, too. You mentioned that now with the Lead Regulation being in place and having been in place now for some time, that there is now an added tool as far as prosecution goes. Did you indicate whether there have been any prosecutions under the Lead Regulation?

A. I did not indicate, but there are some in process already. Charges are being laid under the Lead Regulation.

10 Q. There are charges that are in the process of being laid?

A. Yes.

McLennan
15 Q. Now, the document that you read from this morning, the Operations Manual on Potential Prosecutions, first of all this is taken from the general Operations Manual of the branch, is that correct?

A. That's correct.

20 Q. Is that manual a public document? Is it the kind of thing that people can have access to at the ministry, or is this an internal document?

A. The document resides in the library in the Ministry of Labour offices at 400 University. I also believe that copies have been given to certain labour organizations.

Q. So it would be fairly freely available if someone were to ferret it out.

25 Okay, I'm just...one question I have and I'm not exactly clear how to phrase this, but in reading the second paragraph on the first page, "When other means have not been successful, prosecution is a tool that may be used to assist in moving the performance of management and protecting their workers from noncompliance."

30 Unlike Mr. Laskin, I'm not officially in the

Q. (cont'd.) legal profession, but reading this it strikes me that this 'prosecution is a tool that may be used to assist', strikes me as somewhat different than prosecutions under other statutes. I mean, I think of, you know, the Highway Traffic Act or other kinds of legal prosecutions that are used and they don't strike me, at least when I get summonses, as a tool that may be used to assist me in moving towards the performance of my lack of speeding or whatever.

I'm just wondering...I mean, do you see there being a difference between the Occupational Health and Safety Act and prosecutions under this Act, and other statutes?

A. I guess there comes a point of interpretation. I might suggest that when you do get a speeding ticket it will make you think the next time you go along the same route and whether you will speed or not, so there is obviously that aspect of exerting influence. But I don't see any difference, no. I think it's a statute, whether it's the Highway Traffic Act or whatever, that this one should be very much the same.

Q. So from the point of view of legality or from the point of view of administration, you see no difference in administering this Act as opposed to any other statute?

A. I would say I do not see any difference.

Q. Okay, I would like to turn briefly to the question of the inspectors, and how they make the inspections, and the relationship between the inspector - I guess your diagram on the board - and I'm wondering whether you see a difference and how big that difference would be, between a health and safety committee that would be in what I might term a highly-unionized place - that is, a large union that has a strong health and safety program on its own - and a health and safety committee in an unorganized workplace, and whether the inspector would take a different approach in inspecting or in

Q. (cont'd.) visiting those two different establishments.

5 A. Well, I think we shouldn't kid ourselves, there is a difference. I think it's very much, you know, seen in places like the construction industry where such a large part of the labour force is not unionized, and I think that goes back to what I've said - it takes the three parties and the strength of the government inspector on top, I think should again be
10 sensitive to what kind of relationship exists in the balance between the two at the bottom. In all honesty, I would hope - and I think this does reflect itself in construction where there was the lack of organized labour - that the inspectorate played a much stronger force, they really were the instrument that labour, whether it's unorganized, had to depend on to get some action
15 taken.

I think ultimately in the industrial scene the officer that comes on the site, his first step is to try to establish what kind of workplace conditions were arrived at by the two parties - labour and management - and there is an
20 internal three-step to the inspection cycle, and the first one is...and this is captured usually in a report by the inspector, where he does assess or audit how well the worker and management representatives have been working, and there's some basic questions asked, he then takes his own tour with management and labour, and evaluates the conditions, and then he comes back and
25 discusses with them the differences between what he has seen and what they have told him. So there is room here for different levels of input, again depending on the, I would suggest, the kind of strength and power balance that exists between the two.

Q. Would, for example, in the first stage of that, in assessing the joint committee, would part of the
30 inspector's criteria for determining the effectiveness of that

Q. (cont'd.) committee, would it be to establish the, I guess for lack of a better term, independence of the worker representatives? I mean, we have heard complaints, and I'm sure you have too, that a lot of joint committees in unorganized workplaces are just management appointments that are perhaps leery of expressing their true feeling. I mean, would that be part of the inspector's mandate?

A. I think he should be sensitive to it, yes. Very much so.

But again, the second part of that, when he goes around, it gives him an opportunity to perceive things as being that third party on the scene, and seeing that these are concerns that somebody or one of the parties should have brought up, and that in a way is a bit of a, you know, a screening process to see how actually effective the...whatever arrangement was with labour, whether they were organized or not.

Q. So would it be fair to say, then, that the role of the inspector is more of a policing role in plants, in industrial workplaces, where it is perceived that the worker input to the joint committee is less than otherwise? I mean, is there some sort of...

A. I would like to think so. I would like to think that there is certain strength in that kind of relationship, that if there is a weakness in one of the links, then the other one should pull it up to make the whole thing a nice, solid, you know, a functioning operation.

I think I tend to agree with you, yes.

Q. So to get back to your drawing, we can see the government swinging more to the labour side when that's necessary to pull it up, would that be a fair...?

A. And I would think that that, especially in a construction scene, is very much apparent.

Q. Would that also involve an inspector, for example, ensuring that first of all the worker representatives were aware of all their rights and obligations under the Act?

A. Yes, yes. Very much. I mentioned, you know, the subjects of consultation or appearing before trade unions, and a lot of that takes the form of, you know, reiterating the requirements and what people should look for, and their rights under the Occupational Health and Safety Act, and the Regulations.

Q. So it wouldn't just be a case of the inspector going in and saying are there any complaints, but taking a more active role?

A. Oh, yes. Yes.

Q. Okay. I guess in line with that, you indicated in your opening statement the training received by inspectors, and I've noted that there is a twelve-week training course, I guess on the basic requirements of the Act, Regulations and various procedures.

I'm just wondering if there is any kind of other training that would go on for an inspector which would, I guess for lack of a better term, fall into the area of industrial relations or anything of that nature - I mean, sociology, if you like, understanding the power structure in a particular workplace?

A. Not to that degree, but one of the areas that we have very much called in, and that is that industrial relations individual who reports to the ADM directly. He has come in and provided half-day sessions for our inspectors, and I guess it's not mentioned there, and he also has dropped in where he has brought in health and safety committee representatives, and even management, to sit in together and provide that, and then our inspector or officers in that local area would also attend. But that's about the extent of it.

5 A. (cont'd.) I think if I might just add to that, I think what is emerging obviously, and I think it came in in the Doern's report, is that there is more than just, you know, the policing role for inspectorate, and I think there is the big advantage that as they enter, say, refusal to work, they really are a third party that comes on and hopefully is as neutral as they can be, and yet they can be that catalyst, facilitator, and in many cases can resolve a refusal to work, 10 because you must recognize once it gets to a decision or an appeal, it's a win/lose situation, and many cases - again, hopefully, with the proper kind of training, these people can do a little negotiating to get both parties to come to some consensus. So I see this as a very important role, and again, in all honesty, I don't think we are...we are far from being 15 trained properly to do that.

Q. I guess the reason I raised this and my concerns over that were the diagram as you indicated indicates a, and as you have been testifying, indicates a perfect world of equal power with management and labour, and we heard from 20 Robert Sass last week that part of the role that he saw, of the occupational health and safety branch in Saskatchewan, was to increase the power of the workers up to that of labour, rather than trying to, initially anyway, take the mediation, third part, neutral line, without trying to equalize the power structure that exists, and I'm wondering if you have any comment.

25 I mean, do you see that as a role, trying to equalize that power relationship?

A. I can see that, you know, and...

Q. Assuming that you agree that there is a discrepancy in a lot of workplaces, in the power relationship?

30 A. I can see that, but I can also see that part of that, you know, gaining more strength or power in labour's role

5 A. (cont'd.) comes, and I give very much credit labour, is through education. We are finding now that labour's learning curve, especially with respect to industrial health matters, is rising at such a rate that the other two partners in this are being left on a very flat curve compared to...you know, what I'm saying is, if education is part of that rising, and I think it is, and putting them into being aware of the kind of dangers that exist, that that is very much happening, as a
10 matter of fact, I suggest to you, right now.

DR. DUPRE: Is your comment about the learning curve, in your view, applied as much to nonunionized as to unionized workplaces?

15 THE WITNESS: No, it would have to apply predominantly to organized.

DR. DUPRE: Oh, so it would apply more to unionized, and therefore, of course, tell us something about the educational role of the unions themselves.

THE WITNESS: Exactly, yes.

20 MR. McCOMBIE: Q. Would that in any way...and I certainly don't want to put words in your mouth, but would that in any way be broadening the discrepancy between a strongly unionized place and nonunionized place? I mean, with the increase in education that has occurred in the last few years among trade unions, I mean is there any educational information getting across to nonunionized workers, let me put it that way?

25 A. I think it is, but again it depends on safety associations, and again, we haven't talked about those at all but there are organizations and associations beyond strictly the organized labour that have very much a complementary role to play, and we haven't talked about that but I think it's very
30 important that these come out, and at the same time let's say government, we want to concentrate certain priority areas - whether

5 A. (cont'd.) it be asbestos or lead or one of the toxic substances, there's a lot of room that both labour... and to cover the other part of the work scene, we have the safety associations, and they can put out a lot. You know, I'm talking the IPA's, the CSAO's - these are associations, through the television media, through bulletins and guidelines - they have a very important role to play and when I use the word complementary, it's being done at the same time. We can get
10 at the various bodies and parties.

Q. So you would see the role of the safety associations as complementary to your branch in getting that...

A. Very much so, yes.

Q. ...information across.

15 How about the role of the..I mean, do the inspectors see themselves as having any kind of an educational role - and again with particular respect to nonunionized workplaces?

A. They do, but I don't know if the right word is educational....I guess it is...in explaining the rights and the requirements and the procedures under the legislation and the regulations. Yes, they do that regardless of affiliation.
20

Q. Let's say, for example, dealing with asbestos, if they were to go into a small, nonunionized plant where there is asbestos being used, I mean would they see that as part of their function to give information to the worker representatives and the health and safety committee - again assuming there is
25 one?

A. Yes, in construction there isn't health and safety - they have safety reps - but yes, they do. Very much so. They give the guidelines that I referred to before here. Again, that was probably one of the very first steps, and a lot of this work was done - this was the problem with
30 asbestos in construction - because the notification of construction

5 A. (cont'd.) projects was fifty thousand dollars before the notification was there. In many cases these were small contractors even working with things like school boards, for example, so the explanation of the guidelines was very essential as part of the inspector's role.

10 Q. How about...and again to move to the industrial side...how about in situations where, due to there being less than twenty employees, or for another reason...there isn't a formal joint health and safety committee, would there be any kind of an educational role - again, assume a small manufacturer that would be using asbestos - would there be any kind of a role that the inspector would play in alerting the workers to the danger?

15 A. I would think so. In fact, it would probably be more appropriate in that case, simply because there was no other source for informing the workers.

20 Q. Just one more area I would like to cover, and that's concerning, I guess at page ten of today's submission, and the discussion that you had earlier with Mr. Laskin about prosecutions, and I am wondering if you are familiar with the recent court decision in Windsor, Ontario, which is Her Majesty the Queen against the Windsor Board of Education and Eric Laub?

25 A. I'm just familiar that the case was not successful, but I don't know the circumstances that originated.

DR. DUPRE: Would you, for the enlightenment of the chairman...

MR. McCOMBIE: I'm sorry.

DR. DUPRE: ...could you, for my enlightenment, give me the gist of what that case was about?

30 MR. McCOMBIE: Well, very briefly, Mr. Chairman, it was a case of the Windsor Board of Education doing an inspection

5 MR. McCOMBIE: of their own schools to determine whether or not there was asbestos present, and in doing so they asked one of their employees, who as, I believe, a janitor, to make a tour of the different schools, and there was no protective equipment...

DR. DUPRE: I recall that now.

MR. McCOMBIE: ...provided to this particular worker.

10 Charges were subsequently laid under sections 14 and 16 of the Act, and as Mr. Melinyshyn has indicated, they were unsuccessful.

15 I guess my question is, given section 14, which I would assume would be a general protection clause of the Act, and your discussion of the Regulation...and as you may or may not know, part of the reason that judgement wasn't allowed was because of the fact that there are no regulations on asbestos... and I'm wondering if you or the other people in your branch are concerned by a judgement such as this, which appears to us to have undercut the rights under section 14?

20 THE WITNESS: A. Yes, we are very much concerned. I think as there will be others speaking on this subject, the ministry is moving as quickly as possible and it may not seem that that's the case, but it is, I assure you, on getting regulations out, and I also mention to you that in spite of the number of orders that we put out under asbestos, the question was asked and I replied, that we didn't take these to court.

25 By the same token, let me also say that where we have used guidelines...and again my experience in construction... I was very pleasantly pleased, I was pleased that guidelines had an effect - that once we made people aware of the guidelines... and I can remember reading it in one of the publications - that
30 the guidelines had more response and they took them for what

5 A. (cont'd.) they were, than in many cases where we have probably something more rigid. It's a case where people take guidelines because they is nothing around, and they take them almost as gospel.

10 So the...let's go back to the decision, that the regulations were not in place and I think the steps are being taken for that. I also think that one of the problems with these very general terms is that, you know, the real gist of the thing is reasonable precaution, and I think without getting into the details of that case, there were some instructions left that management had, apparently, left some sort of...had given certain material and instructions to the gentleman, where he chose not to use it.

15 Now, whether that had any influence on the case, I don't know, but that's possible, and that's the trouble with some very general things like what is a reasonable precaution.

20 They thought that instructions, possibly, were enough. But the new regulations, as I'm sure you'll hear in the next few days, will deal very much with definite numbers and limits, and monitoring techniques and control programs, assessment, medical surveillance, and that will all be part of it.

25 Q. So am I to understand by that that, I guess, the thrust of the ministry or the thrust of your branch is towards regulation and attempting to regulate as much as possible any conceivable, first of all toxic substance, but also any other unsafe conditions?

A. Yes.

Q. Rather than relying on, I guess, the catchall phrases of the Act itself?

30 A. I think it's no secret that the more definitive you can be, and again one...well, I won't get into the whole subject of how far regulations should go, but obviously the more

5 A. (cont'd.) definitive you can get with very specific hazards, there is much greater success of understanding and compliance. We will be pursuing that, yes.

Q. Can I ask, just as a final question and I don't mean to put you on the spot, and I realize you are not initially in a position to make this decision, but do you know if there's any plans to appeal this decision, within the ministry?

10 A. Let me say...I was going to say no comment. The only thing is, you should be aware that the ministry did not lay charges. The charges were laid by the union against management, so the Ministry of Labour was in no way involved and therefore I can't comment.

MR. MCCOMBIE: Okay, thank you.

15 I have no more questions.

DR. DUPRE: Miss Jolley?

CROSS-EXAMINATION BY MISS JOLLEY

20 Q. I wonder if I could just pursue the...your indication that there will be...that the thrust of the branch is to regulation, Dr. Ann Robinson last summer indicated in the Globe and Mail article that perhaps this was a time of deregulation, when she was asked about the construction regulations.

I just wonder, is that a change in policy or is that a difference of opinion?

25 A. I seem to recall that interview with the Globe and Mail. Do you remember the correspondent at all? No?

Q. Charlotte Montgomery.

A. Montgomery, yes.

30 I think that occurred very early in the conversation, and I guess the impression that was intended there was to sort of keep, generally speaking government has a thrust of deregulation and cutting red tape and all the rest of it, how do

5 A. (cont'd.) we sort of reconcile on one hand government's pursuing deregulation, but at the same time putting in some more concrete regulations.

I would suggest that that isn't necessarily a policy, or is this a change of policy. I think it's a clear cut direction that every one of the parties up there know that the government is proceeding, they have designated certain substances and they are proceeding to get the regulations on those substances.

10 Q. When do you think we will see the construction regulations for the various designated substances...procedural?

15 A. The construction...yes, you use the key word, procedural...will look very different from the industrial, and at the time we were there and again, not having, as a line branch, a program involved with program delivery, the direct involvement in producing them, but we were instrumental in working with them - again, from the point of view of the subject we are talking here today, enforcement and implementation.

20 They, I would suggest, will be very close on the heels of the other - that's the basic, general regulations for asbestos - and if I may suggest that if it keeps going this way, they both will come out simultaneously, but they won't be far behind.

Q. Will we see similar construction regulations for lead?

25 A. Yes.

Q. And other appropriate designated substances?

30 A. The intent is...because, as I mentioned, the whole construction industry is very different and that it would be more appropriate to use procedural type regulations, so for the designated substances that do occur in construction - lead is one of them, noise is another, for example - the intent, if I may, kind of suggest that yes, they will be separate from what

A. (cont'd.) is called the general industrial regulation.

5 Q. You mentioned...I think, in fact, Dr. Robinson was asked about notification requirements, because we were expressing concern about small, fly-by-night operations that were carrying out asbestos in shcools, etc., last summer...and the notification requirements in the Construction Act, as you indicated, are any site involved with fifty thousand dollars or
10 more, and most of those were not.

Would you see it as a useful thing to have any kinds of notification where asbestos is being removed, or building are being demolished, where asbestos is, or would that be useful, do you think, to the branch to be notified?

15 A. Yes, it very much will be useful. The similar situation exists, because trenching is a very dangerous thing in construction, and as you know, city holes open up and get closed the same day all over the city, there is a requirement that trenching is a phone-in notification. Now, that doesn't mean our inspector can get out to every one of them, but we can very much
20 surprise wherever we want.

The intention, if I may say, if the reg does go ahead for construction asbestos, it will have that phone-in requirement in it.

25 Q. Is there requirements for training, etc., for the workers involved in removal of asbestos, or demolition?

A. I can't be sure.

Q. All right.

I would like to go back to the actual regulations that have been issued, the designated substance regulation, and during the formal hearings about them, the open hearings, it was suggested that there would be codes of practice addressing
30 things like locker rooms and some of the concerns that labour

5 Q. (cont'd.) addressed, that there would be, rather than a code as a part of the regulation, that they would be issued as a separate...do you know if those are going to be available soon?

10 A. I can't be sure, but I know that there are more instructions that were intended to be issued, and I'm sure they will be issued, like, with respect to what constitutes proper assessment, this type of thing, and perhaps again we can address...I think Arthur Gladstone will be appearing and talking about legislation and the backup material.

15 Q. May I ask you as a person involved in your two hats, if there are construction workers responsible for the removal of machinery, etc., from...well, let me use the example of the J-M, Johns-Manville, when they removed the machinery and the piping, etc., from Johns-Manville. What branch is responsible for overseeing that? Would that be the industrial safety branch?

20 A. Generally we have an internal division, that if it is again a project that's registered as a construction project and a contractor comes in to take it out, that would be the construction branch. It's possible that they, with their own employees - I don't know the circumstances - you know, that sounds like a funny division, but if they, with their own employees, is it any different than maintenance work and taking the thing apart, and it's possible that that would be under
25 industrial.

I would just like to make the distinction, though I don't think it matters particularly, any inspector is an inspector is an inspector, so it doesn't matter under which legislation we choose to take action or orders.

30 Q. The situation at Johns-Manville when the machinery was removed, was that the workers were not issued...the

5 Q. (cont'd.) actual workers on the site of removing the machinery...were not issued with respirators. They were cutting through piping where the asbestos was being pushed into machines, etc., and it was not until the Johns-Manville workers in fact informed them that they shouldn't be doing that that there was some concern and that the ministry was in fact brought in at that point.

10 I guess, again, would it be useful if that kind of removal of machinery or whatever, that companies must inform the ministry that that is going to take place?

A. I think it would be very much useful. I would suspect that even under those circumstances that would be a pretty major undertaking and would qualify as a normal notification project, to be notified.

15 Q. I think to come back to the orders, and you suggested that you did not have the information and perhaps I will ask Mr. McNair as well, but information given during the estimates were that ten percent of the industrial orders were repeats as well, and it was suggested that those repeats were under section 145, which as you noted was a section about toxic substances, essentially, and it's of some concern that most of the repeats, and that would be over three thousand repeated orders, were being issued around toxic substances, and I think the other area was flammable substances.

20 We can understand that some time has to be taken to put in ventilation systems, but it is of concern as to when did the repeats stop and when, you know, what is an appropriate time and how do we participate in deciding whether there is an appropriate time?

25 A. Maybe just by way of comment rather than something very definite, I would be surprised if that many would have been under 145, and I think that's something we should look

A. (Cont'd.) into, but it may...

Q. I don't think all of them were under 145, but a majority.

5 A. Okay. But the majority. Again, I have a problem with that, but it's possible that that's because it was, again, a very general requirement, that no action was eventually taken and that we chose where other orders were repeats, we had very definitive regulations, numbers, requirements, and that
10 action was taken and they were wiped off the so-called repeated list.

It's entirely possible, I guess, because it is a general one, as I mentioned. There was no prosecution, to my knowledge, under 145, for asbestos.

Tolley
15 Q. Speaking of prosecutions, and you did mention that you were proceeding with two charges on the Lead Regulations, or several charges under the Lead Regulations, what is the ministry doing to assess whether or not assessments are being carried out and whether control programs are in effect?

20 A. I'm kind of glad you asked that, because we, again, sponsored by some very direct questions in the House exactly to that effect - what the ministry was doing - we have just about completed a complete evaluation and a survey, and much of the information I left on that last page with respect to asbestos, I think it's a very good approach for documenting
25 all of the firms, where they stand with respect to their assessment being done or not done, how many orders are outstanding, some of them have progressed to the point of putting control programs in, others have that in, but no medical surveillance program, and that is a result of a special initial
30 survey, but it will be tied in totally to the cyclic inspection and will be kept up to date, and that report will be available very shortly.

Q. Do you know that all the lead plants in Ontario have carried out assessments?

5 A. I know that they have not all carried out assessments.

Q. The particular situation, of course, that was raised in the legislature was the Wilco situation, which was an unorganized plant in London, where workers were in fact suffering from very high levels of blood lead levels, and they had also experienced some kinds of threats from management.

10 Is that where the charges are being laid?

A. No decision has been made in that one, in all honesty. The letter itself, in spite of how incriminating it might have looked, it's difficult...it appears on the surface to be a threat, but maybe this isn't the place to discuss it.

15 Q. Could I ask you why you are not proceeding with charges against a clear violation of the regulations?

A. In respect to that particular firm in lead?

Q. Yes.

20 A. Again, it appears very much that there is clear reason to, obviously, because of the number of affected workers. I have to rely on our legal counsel to really, in that particular case, to put together...and it has a lot to do with the transition period between the time you are under 145 and the time the Lead Regs came in, and the application, the testing that was done.

25 But that is still under review by our legal people.

Q. I have one last question, because we keep getting different suggestions as to the standards, or rather the guidelines for asbestos, and yesterday we were told by Mr. Rajhans that in 1975, there was a zero point five...or zero point two fibers per cubic centimeter guideline set for

Q. (cont'd.) crocidolite, and in your presentation you said for amphiboles, and presumably that includes amosite?

A. It includes amosite and crocidolite.

Q. Right. And I just wanted to clarify that, because that was my understanding, that amosite was also at point five...or point two rather, excuse me.

A. Well, perhaps, again, we shouldn't pre-empt Mr. Gladstone. He will discuss that quite thoroughly, I'm sure.

MISS JOLLEY: That's all. Thank you.

DR. DUPRE: Mr. Lederer?

MR. LEDERER: Thank you, sir. I'll be very brief indeed.

CROSS-EXAMINATION BY MR. LEDERER

Q. I only have two questions, although they may grow into something slightly longer than that.

Mr. Laskin asked you whether or not there had been any prosecutions with respect to asbestos. Do you recall that?

A. Yes.

Q. Your answer was no. I'm curious to know whether or not you have an opinion, and if you do, what it is, with respect to this question: Given the fact that there have been no prosecutions, can you indicate whether or not you are of a view that asbestos has, nonetheless, been controlled in the workplace by the other avenues that are open to the ministry - for example, the kind of orders that you have discussed here?

A. No, I am not prepared to say that it has been controlled. I think we still have a way to go. I think a lot has to do, possibly, again, with the kind of actions that can be taken with definite regulations, but I believe...and again, from just seeing it in the two positions, probably more from construction,

5 A. (cont'd.) that there is an education and a communication that's necessary, and the areas that we have run into problems - and they are very current, as a matter of fact they have been hitting the newspapers over the last two days, as a matter of fact - so when one makes the assumption that everybody knows about it, there are still people who aren't aware and it's a matter of communicating, so I could not say that the procedures that we have in place now totally lick the problem.

10 Q. My second question is, if I can turn to something which I believe Miss Jolley asked you about, and that is the problem of the repeat order, in the circumstance where there is a repeat order, and you indicate are workers protected in the meantime?

15 A. Oh, again, one gets, starts to get technical, and I mentioned that in a lot of these repeat orders the situation might get cleared up right at the time - the inspector is still in the plant, leaves it, and the situation gets cleaned up, and then on another occasion, whether it's the point of a complaint or on his next inspection, so the idea of guard rails appearing on a first floor, third floor, fifth floor, or a pool of water that is there when he does an inspection and the same item comes up again, in a lot of the cases these are corrected but the items then come up again as they are allowed to recreate themselves.

20 Q. But there is a process in place that attempts to look after the problems while the repeat order is in place?

25 A. Yes, there is, and again I mention briefly there's computer systems that kick out at thirty days letters to the employers, and then followups at ninety days. There are procedures.

30 MR. LEDERER: Very well. Thank you very much.

DR. DUPRE: I just have a few questions, Mr.

Melinyshyn.

5 I take it from your initial answers to Mr. Laskin's question that the overwhelming portion of your career in public service has been spent in the Ministry of Transport and Communications, is that correct?

THE WITNESS: I never thought of myself as a public servant, but I guess it is, yes, sir.

10 DR. DUPRE: Now, of course, it strikes me as I recall that ministry that they have very substantial inspectional duties in some of their branches. Were you ever involved with the inspection side of Transport and Communications? Be that in trucking, etc., etc.?

15 THE WITNESS: Not on the drivers and vehicles side. I have some background, because of the engineering, with respect to construction, this type of thing.

DR. DUPRE: The question I had in mind was whether you had acquired or formulated or detected an inspectional philosophy in that ministry that was useful to you now in your new duties in the Ministry of Labour?

20 THE WITNESS: No, I haven't, and you know, that's interesting. I probably should have. No, I haven't, sir.

DR. DUPRE: To take up a point that Mr. Lederer raised with you with respect to the fact that there have been no prosecutions with respect to asbestos, would the same hold true of all of the other substances that have simply been subject to regulation by guideline, over these several years? Have there been no prosecutions there either?

25 THE WITNESS: I am at a disadvantage because I can't bring in the history aspect of it, but I might suggest that it would very much be the case. But I'll leave that, maybe, to be asked again of another party.

5 DR. DUPRE: With respect to the Windsor case that Mr. McCombie was discussing with you, are we looking at a situation there if the Director, capital D, as he is named in the Act, has used the powers that are there under section 20, I believe it is, then that worker could indeed have been in a situation where the protective equipment would have been required?

10 THE WITNESS: Let me just begin by saying that in that particular case, in the Windsor one, again, I believe our ministry did take a very serious look at laying charges, and the decision was made not to. In this particular case the union took it upon themselves.

15 The reference to section 20, that is a section that has not been used too much in the past. I must admit, though, in my ten weeks here I've used it once already, and that had to do, and there's reasons for it, because the next appeal is back to the minister. But that has been used, and this had to do with PCB's, but it is not one that we have commonly used.

20 I am not too sure if the reference, had that been used, in that particular circumstance would that have made a difference whether we, as a ministry, would have taken up or laid charges. I think a lot had to do with the circumstances and with the instructions that that employee actually received, and I may suggest that that had a lot to do with the decision on that case, too.

25 DR. DUPRE: Let me put a problem to you. We have a quite well-developed process for designating hazardous substances, in this province, and as you know, when Professor Doern reviewed that process he does so quite favorably, and he does so quite favorably not least because, you know, if one takes up the standard public administration textbook checkpoints about what a good regulatory system should be, it does provide for
30 openness, the submission of briefs, some reactions by the

DR. DUPRE: (cont'd.) regulators, so on and so forth. At this point, certainly, the process gets a high public administration mark, if I may use that term.

Now, in the real world the fact of the matter is that such a process, where any of a number of substances are concerned...so in that sense maybe asbestos is a case study from which we can learn...in the real world that kind of a process would earn high marks in public administration. It takes time.

The question I will tell you frankly I am puzzling over is, has to do with the extent to which in a setting where designating a substance, and that means attaching a number, an exposure level, may not, of course, because of the time involved, deny the workers certain protective measures that are only triggered once the number has been arrived at and the substance has finally been designated.

Now, I have been interested in section 20, among other things, for this reason, because I asked myself, well, is section 20 adequate, let us say, to enable any of a number of protective steps to be taken before an actual control level is reached.

How adequate do you think section 20 is in this domain, and perhaps to put the question in an even more concrete way, should we, if we are looking at what ought to be done, look at the possibility of legislation that would permit a substance to be designated, but without a number, so that certain events would automatically take place while they are waiting for a number?

THE WITNESS: Let me begin by saying that possibly section 20, having applied it once, I had a problem. If I remember...I don't remember the exact words, but the top of the righthand page, just from memory...there's requirements there that the director has to give reasons and...thank you very much.

DR. DUPRE: Could you play section 20 on my piano again? It's a song I can't...what are the words?

THE WITNESS: Okay.

DR. DUPRE: Section 20.

THE WITNESS: Section 20, again, gives or essentially gives to the use in the opinion of a director, where it's likely to endanger, he can take certain steps:

"Prohibiting, limiting, subjecting".

But the important statement that I found very difficult to live with, and this will get us into the numbers, is section 2 (b), that finally when it really hits the fan is, the director has to give the likelihood of the danger to the health of the worker, and his reasons that give rise to an opinion.

Again, without dealing with any substance and recognizing that this is a pretty serious state, we apply it to a major firm and we're talking prohibiting, and that means millions of dollars, he's out of business. So we have to have our justification quite down pat, and I would suggest that in the long run, even though the process that, again, there will be room for discussion, I think, later on on the process when other parties appear, but the process has the advantage of getting everybody's opinion, and whether it's numbers, on the table, and discussion to take place.

I would like to suggest that maybe the first two designated substances did take a long time. I think what we are finding is that they are very much, a lot of it, both the process and also the content of the regulation itself, is virtually repetitive. In fact, they are all going to demand an assessment, they are going to demand a control program, they are going to demand a medical surveillance program, and one starts to see the framework fitting into place, and other than possibly agreement on some number - and I'll just suggest another

THE WITNESS: (cont'd.) approach maybe there that
could be done - we have the potential of really rapidly duplicating,
and we also have the potential of generalizing, putting out all
that structure and just leaving the actual numbers and let it
fall into place.

So rather than putting out a little green book on
lead, a little green book on mercury, we could come up with
something that looks like this and would relate...the structure
would be very common to all...or a good part of the other
designated substances.

I would also suggest that one way around the
number business, and it's not anything new, but it's possible
that, again, we have to recognize that we have tolerated it for
so many years that maybe we should be looking at staging, and
instead of try and devise a number that says tomorrow or ninety
days after this comes into effect we are going to have this limit,
why not stage it and recognize...and again, part of a process, in
getting there, would be to come at stages...we know some parts
of the industry are well below this number and we don't want them,
as you said the other day, to come back up, and at the same time
we...well, we can put guards against that...but at the same time
have a realistic approach and say as time passes and everyone
knows that the other is there, it's nothing new, it's the old
small cars in the automobile industry - it was coming, it's just
a matter of staging it.

So I think there are ways, you know. I think if
there's an apology - yes, it took a long time to get out - I'm
not too sure that people weren't totally protected...you know,
the regulations, when they do come out, aren't magic. They
aren't going to turn around over night and provide everything
in black and white, but I think if we pursue the business of
getting something out - and even though it's not quite the right

THE WITNESS: (cont'd.) number - for example, asbestos, a lot of concerns waiting for the kind of recommendations that may come from this Commission, and there's no reason why that can't be subject to the kind of recommendations that come out.

Those are just my thoughts on the subject.

DR. DUPRE: I'm all ears for those thoughts.

Given your personal knowledge of this Act, is it possible within this legislation to designate a substance without a number? Can a substance become a designated substance, for the purpose of this Act, without having had a numerical control limit assigned to it as part of the designation process?

THE WITNESS: I think so, but again, that is subject to a stronger interpretation by our legal people. But I would think there is no reason...I think depending on the process, the procedure, the structures within it, that it could have the designation without the numbers.

DR. DUPRE: I'm going to follow that up, and we will as far as I'm concerned.

I don't want to detain you too long, but again, I was all ears as you were expressing your views a moment ago, and you displayed, of course, your own knowledge of the fact that there are any of a number of firms in, for example, the asbestos industry that, in terms of exposure levels are operating at levels quite a bit below some of the exposure limits that have been before the public in this province, and I took it from your remarks that you consider that highly desirably that in any kind of a regulatory regime so-called good performers be given every incentive and push possible to (a) try to keep performing better, and above all (b) not to creep up.

What kind of scope does the current Act give to inspectors to play their own role in terms of preventing upcreep and encouraging the good performers to keep performing better?

5 THE WITNESS: Just on first reflection, I would suggest that that is not really there to encourage...I'm thinking of very definitely clear procedures that may suggest that an industry, because they have achieved certain targets or levels, and it could be proven that they were able to achieve them, but they changed their processes and went back up, none of that I don't believe exists in the legislation.

DR. DUPRE: Mr. Laskin, any final...?

10 MR. LASKIN: No questions, Mr. Chairman.

DR. DUPRE: Well, Mr. Melinyshyn, may I thank you most sincerely indeed for your time, which certainly was well-spent with us as far as we were concerned, this morning.

Thank you. We shall rise until two-fifteen?

15 MR. LASKIN: Sure.

DR. DUPRE: Oh, Mr. Lederer?

MR. LEDERER: Sir, I wonder if I might make a couple of comments before you rise for the break?

20 I indicated yesterday that my instructions were, and I have attempted to comply with them, to be as open and forthcoming as we can with all the information that we have been requested, and just with that in mind I wonder if I might take a few moments to bring you up to date on our efforts to comply with what I take to be five undertakings which we have currently made and are now before this Commission.

25 The first is that you asked us to...you asked Dr. Vingilis to provide you with answers to a particular question relating to medical surveillance...

DR. DUPRE: Right.

30 MR. LEDERER: ... under the new regulation. That is still dependent upon our obtaining the transcript so that we can convey to Dr. Vingilis those sections of the transcript which relate to that.

MR. LEDERER: (cont'd.) I discussed that matter with the reporter yesterday, and I'm told that the transcript should be in our hands by the end of this week.

That is the reason for the delay there.

You have asked, this morning, for the manual, the Operating Manual for the construction health and safety branch, and in the course of the morning we have obtained a copy of that for you, and I'll give that to Mr. Laskin now.

We have also obtained a full copy of the Operating Manual of the industrial safety branch. I hasten to add that when you look at this you will see that the volume which we are handing Mr. Laskin has on the front of it, volume one. I am told that volume two contains only engineering data and is not procedural in any context and presumably wouldn't be of any assistance to this Commission.

Miss Kahn asked us yesterday if we could assist her in obtaining a second copy of Mr. Rajhans' second book.

I have discussed that with Mr. Rajhans and I understand that he no longer has any extra copies, but I have told Miss Kahn that we would be happy to use whatever power Mr. Rajhans may have as author to obtain another copy from the publisher.

DR. DUPRE: As a sometimes-author, that is probably...

MR. LEDERER: I beg your pardon?

DR. DUPRE: As a sometimes-author I can tell you that his power there is probably slight. Also as a sometime-author, I believe that authors should never be asked for copies of their books because it never ends.

MR. LEDERER: Well, I have gone so far as to offer my personally-autographed copy, which may have been a mistake on my part.

MR. LEDERER: (cont'd.) I have spoken to Mr. Rajhans with respect to Dr. Uffen's question as to whether or not there is material present to produce the comparative lines.

I understand that he has started his search this morning and there is some material there, but he is not yet ready to say whether it is sufficient to produce the work that has been requested.

He has, however, told me that he is hopeful that I should be able to give you an answer as to the possibility of the development of those lines, by tomorrow.

Finally, you have asked us for a legal opinion, if there is one, dealing with the words 'examining physician' as they are contained within the regulations concerning lead.

There is an opinion. I have a copy, but I hope you will understand that in producing that copy to you we would be breaching the normal rules of solicitor/client privilege, and while I assume that isn't going to be a problem here, it's not something which I perceive I have the authority to do unilaterally and I'm going to have to obtain specific instructions with respect to that, and I hope to have it by this morning.

I don't for simply reasons of locating people, and I hope to be able to produce that for you tomorrow as well.

DR. DUPRE: Just with respect to that last point, and I don't know if this is going to be helpful or otherwise, if I remember right, the Gunderson/Switon study has a passage in which they describe, I think, an interpretation that was given of a particular clause in this Act.

MR. LEDERER: Yes.

DR. DUPRE: Now, is the kind of interpretation, counsel, that they are describing there, something different from what would involve a solicitor/client privilege, because I take Mr. Lederer's point well. I'm not sure without consulting

DR. DUPRE: (cont'd.) with my colleagues whether this Commission would want to poke itself into a solicitor/client situation unless you had good reason for wanting to do so.

MR. LASKIN: Well, as I understand the Gunderson/Switon interpretation issue, it revolved around whether in dealing with work refusal situations, both before and after and inspector is called in, whether it's a subjective test in the first instance and an objective test in the second instance, and I think the ministry had put forward a particular interpretation position which...I'm not sure it found its basis in a legal opinion, but from my discussions with Mr. Gladstone and others, there are certainly people within the ministry who can speak to that interpretation. This may be a different matter.

MR. LEDERER: I think the only thing that I would say is at least at this stage I wouldn't want be taken as attempting to hide behind that. On the contrary, we are attempting to get the instructions.

DR. DUPRE: I take your point well, and of course, you know, I'm sure you would also understand that back of what I said is, once we know that it is possible for a reasonable lawyer to have an opinion of some kind, if we don't like what that looks like, that, of course, takes us right to looking at the legislation and saying well, maybe we ought to do something with the wordings here. The particular ground on which a lawyer may have given that advice is very secondary to us. The very fact that a reasonable lawyer might be able to give that kind of advice to a client is more than enough for me.

MR. LEDERER: If I may offer a personal word, and it's completely personal, the more difficult problem, it seems to me, with respect to this kind of opinion, is that really there is only one agency in our system which can interpret legislation, and that's the courts.

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DR. DUPRE: That's right.

MR. LEDERER: And I'm not really sure what standing
this kind of opinion has anyway.

DR. DUPRE: Fine. Well, thank you very much.
We will return at....

Thank you, Mr. Melinyshyn.

MR. LASKIN: Thanks, Mr. Melinyshyn.

THE INQUIRY RECESSED

THE FOREGOING WAS PREPARED
FROM THE TAPED RECORDINGS
OF THE INQUIRY PROCEEDINGS

Edwina Macht
EDWINA MACHT

(REPORTER'S NOTE: For the ensuing p.m. proceedings,
see volume 43 B)

